Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Order Approving Settlement Agreement Between Southern California Edison Company and Salton Sea Power Generation, L.P., et al.	Application 05-01-015 (Filed January 19, 2005)

OPINION APPROVING SETTLEMENT AGREEMENT BETWEEN SOUTHERN CALIFORNIA EDISON COMPANY AND SALTON SEA POWER GENERATION, L.P.

This decision approves two agreements reached between Southern California Edison Company (SCE) and Salton Sea Power Generation, L.P. (Salton Sea) to resolve complex disputes and related litigation involving power purchase contracts.

Background and Summary of Agreements

On January 19, 2005, SCE filed this application for approval of two agreements with Salton Sea that would resolve complex disputes and related litigation following a failure of the Salton Sea 4 plant, which provides power to SCE under a power purchase agreement (PPA).

First Agreement. The first agreement involves the settlement of an "uncontrollable force event" and related deration claims pertaining to the Salton Sea 4 geothermal plant. On July 10, 2003, the plant's sole turbine generator failed, causing malfunction of other plant facilities. The plant did not resume normal operations until September 27, 2003. Because of the plant's failure, Salton Sea did

not meet contractual performance requirements for July 2003 and SCE placed it on probation according to the PPA, effective August 1, 2003. Additionally, the project was at risk of deration because it could not meet performance obligations in August and September 2003.[1] Salton Sea responded by contending that the plant's failure constituted an "uncontrollable force event" under the contract, that is, an unexpected event which it could not have anticipated or prevented by the exercise of reasonable diligence. If the failure is deemed an uncontrollable force event, the PPA excuses the power seller from performance requirements and the plant would not be subject to deration. The power seller would be entitled to capacity payments for a period of up to 90 days.

In this case, SCE claimed that the plant's failure was not an uncontrollable force event, but resulted from poor maintenance and operational practices by Salton Sea. Salton Sea claimed the event was an uncontrollable force event and that it lost over $2 million in capacity payments as a result of SCE's improper denial of Salton Sea's claim.

The parties' agreement on this issue provides that

1. Salton Sea withdraws its claim that the subject plant failure was due to an uncontrollable force;

2. Salton Sea withdraws its claim to maintenance credit of hours in September 2003, and;

3. SCE agrees to end the probation period and agrees not to derate the project for its non-performance between July 10, 2003 and September 17, 2003.

[1] "Deration" is a reduction in the power seller's level of committed firm capacity under the contract. Deration results in reduced capacity payments to the power seller and may require repayments to the buyer.

This agreement relieves SCE of the $2 million payment Salton Sea originally claimed was owed to it for improper deration. In light of its claim that Salton Sea's maintenance of the plant led to the plant's failure, SCE also states it has worked with Salton Sea to assure that future plant maintenance is consistent with industry standards. The settlement "imposes no new obligations" on SCE or its ratepayers.

Second Agreement. The second agreement amends the formula in two existing PPAs used to establish payments for power. Specifically, SCE determines payments for power from the Salton Sea 4 project and the Salton Sea 1 project according to a price index formula. One component of the formula is an index published by the U.S. Department of Labor, Bureau of Labor Statistics (BLM) to track labor costs. BLM discontinued publishing one of the indices in March 2003. After failing to agree to a replacement index, the parties agree to replace the discontinued index with a formula that projects the historic growth rate of the discontinued index into the future.

Discussion

Test for Approving Settlement Agreements

In determining whether a settlement is fair, adequate, and reasonable, the Commission reviews a number of factors. These factors include whether the settlement reflects the relative risks and costs of litigation; whether it fairly and reasonably resolves the disputed issues and conserves public and private resources; and whether the agreed-upon terms fall clearly within the range of possible outcomes had the parties fully litigated the dispute.[2] The Commission

[2] Decision (D.) 96-05-070, *mimeo.*, at 5, 66 CPUC2d 314, 317 (1996), *see also* D.96-12-082, *mimeo.*, at 9, 70 CPUC 427, 430 (1996), *Re Pacific Gas and Electric Company*, D.88-12-083, 30 CPUC2d 189, 222 (1988).

also has considered factors such as whether the settlement negotiations were at arm's length and without collusion, whether the parties were adequately represented, and how far the proceedings had progressed when the parties settled. The Commission will not approve a settlement unless it is "reasonable in light of the whole record, consistent with law, and in the public interest."[3]

Application of Test Approving Settlement Agreements to This Proceeding

The settlement presented in this application would resolve two unrelated disputes. SCE's application states the settlements follow several basic principles:

> The settlements resolve all disputed issues as required by Commission precedent;
>
> The settlements would not set a precedent for SCE's transactions with other power suppliers;
>
> The settlements result in substantial ratepayer benefits considering the relative merits of the parties' claims and litigation risks;
>
> The settlements would require Commission approval.

The settlements that are the subjects of this application resolve all outstanding litigation and other claims and potential claims. No lawsuits have been filed on these subject claims, although the application states that each side invested substantial time and resources to assess the cause of the Salton Sea 4 plant failure and whether the failure triggered either the uncontrollable force clause of the PPA or justified a derating of the plant. For the labor index dispute, both sides consulted economic experts and analyzed a variety of alternatives. SCE's asserts the settlements provide substantial benefits to ratepayers by

[3] Commission's Rules of Practice and Procedure, Rule 51.1(e).

avoiding the risks and costs of extensive litigation. The Salton Sea 4 agreement also relieves ratepayers of a $2 million claim for capacity payments, and imposes no new liabilities on SCE ratepayers.

The settlements before us are straightforward and simple. They both resolve disputes that would otherwise be the subject of costly litigation. Indeed, in these particular disputes, the costs of litigation could easily exceed the sums in dispute. The terms of the settlements certainly lie within the range of possible outcomes had the matter gone to trial.

There is no evidence of collusion and it appears the parties negotiated the settlements in good faith and with the consultation of technical, legal and economic experts.

Finally, the parties were well aware of their respective positions given the analysis they conducted of price index options and plant operations prior to reaching the agreements. Thus, the settlements meet the test of reasonableness and should be approved.

Conclusion

The settlements that are the subject of this application resolve matters relating to the operation of and payments to Salton Sea projects for electricity deliveries. They would avoid costly litigation and reasonably balance the interests of SCE's ratepayers with those of Salton Sea. We herein find the settlement agreement is reasonable and in the public interest.

Motion for Reconsideration of ALJ Ruling

On January 19, 2005, as part of its application, SCE filed a motion seeking confidential treatment of portions of its application. On April 4, 2005, the Commission's Law and Motion judge denied SCE's motion. Subsequently, on May 31, 2005, SCE filed a motion for reconsideration of the April 4 ruling. By this order, we deny the motion and affirm the ALJ ruling.

By motion filed concurrently with the application, SCE sought leave to file portions of the application and accompanying exhibits under seal and for an order withholding this information from public inspection. SCE justified its claim for protection on the grounds that: (1) the confidentiality clause in the settlement agreement regarding the uncontrollable force dispute prohibits SCE from revealing this information, and (2) disclosure of the information, including what concessions SCE gave here, could cause SCE competitive harm in negotiating settlements of future similar disputes and impair SCE's ability to obtain the best possible settlements on behalf of its ratepayers.

The Law and Motion ALJ ruled that the parties' private agreement to keep the settlement confidential is not binding on the Commission and does not outweigh the public interest in open proceedings. In any event, the settlement agreements and accompanying discussion are not entitled to confidential treatment because SCE has publicly disclosed the terms of the settlements. After careful review of SCE's claims, we deny its motion for reconsideration and affirm the ALJ ruling.

In this case we find, consistent with the ruling of the Law and Motion ALJ, that the settlement terms are not confidential and therefore there is no basis for sealing the information for which SCE claims confidential treatment. SCE has already publicly disclosed all material settlement terms. Disclosure of the agreements themselves and of SCE's discussion of why the terms should be found to be reasonable will not reveal any other significant settlement terms to other potential litigants to use to SCE's negotiating disadvantage.

With respect to the price index agreement, SCE states in the public version of its application and accompanying exhibits that the parties agreed to replace the SIC 131 component of the Price Index with "the actual percentage historical growth rate of the SIC 131 index, during the period when it was applied under

the Contracts, from the second quarter of 1992 and running through the first quarter of 2003, when the SIC 131 index terminated," that "the parties agree that SIC 131 demonstrated a 0.0089 quarterly growth rate" and to apply this growth rate into the future, and that the growth factor would become effective for all energy and capacity deliveries post January 1, 2005. The Price Index Agreement contains no other terms, other than boilerplate.

With respect to the Settlement Agreement concerning the uncontrollable force dispute, SCE states in the public version of its application and accompanying exhibits that Salton Sea withdraws its uncontrollable force claim, SCE agrees not to derate the project, and the parties agree to resolve the price index dispute as described above. The Settlement Agreement contains no other terms, other than boilerplate.

The boilerplate in both agreements identifies the parties, describes the parties' responsibilities with respect to obtaining Commission approval of the agreements, provides termination terms and conditions in the event the Commission does not approve the agreements, identifies governing law, provides for the agreement to inure to successors and assigns, identifies the individuals to be noticed under the agreements, provides that each party shall pay its own costs and expenses, provides that the agreement may only be amended in writing, and so on in this vein. The negotiating disadvantage and resulting harm to ratepayers and to SCE that may be caused by disclosing these boilerplate settlement terms is insignificant.

SCE claims that, having disclosed basic information sufficient to reveal the ratepayer impact of the agreements in the public version of the application, disclosure of the remaining information is unnecessary. SCE turns the standard for closing a public record on its head. The public interest in open decision-

making is not defined by what SCE or any other party believes the public "needs" to know.

SCE maintains that Commission precedent protects discussion of litigation risk from disclosure, and cites to D.04-08-032 and D.04-04-067 for this proposition. To the contrary, D.04-08-032 and D.04-04-067 kept confidential discussion of litigation risk for the express purpose of maintaining the confidentiality of the settlement terms. In the present case, SCE has already disclosed all material settlement terms; disclosure of SCE's discussion of litigation risk does not disclose any confidential terms of the settlement.

SCE suggests three other reasons for sealing the discussion of litigation risk from the public record. First, SCE states that disclosure "would negatively impact SCE's ability to address future uncontrollable force disputes." This is a conclusion for which SCE offers no explanation, and we reject it.

Second, SCE states that requiring it to reveal its litigation analysis "could impact SCE's ability to fully explain the basis for its decisions to the Commission, thereby affecting the quality of information that could be made available to the Commission in its review of SCE's contract administration activities." We reject the premise that SCE's potential future failure to justify its contract administration activities to the Commission is cause for sealing Commission records from the public; to the extent that SCE fails to justify its contract administration activities to the Commission, the remedy is to deny it rate recovery.

Third, SCE states that revealing its discussion of litigation risk "might serve as a disincentive to settlement." We note that providing "[…] a statement of the factual and legal considerations adequate to advise the Commission […] of

the grounds on which adoption is urged" is required whenever a party seeks Commission approval of a settlement. (Rule 51.1(c).)[4] However, nothing in this record or in our experience under Rule 51.1 gives us cause to believe that the presumption of a public record has a chilling effect on settlements. We reiterate that, in order for information in a Commission proceeding to be kept from public disclosure, "there must be a demonstration of imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental." *Re Pacific Bell*, 20 CPUC 2d 237, 252 (1986).

SCE points out that the ALJ ruling makes public "confidential details related to the implementation of proposed corrective measures by the qualifying facility (QF) and to the resolution of other pending disputes," and cites to the "Uncontrollable Force Agreement, Exhibits 1-3, (Exhibit SCE-2)." There does not appear to be a document entitled "Uncontrollable Force Agreement" in the record. However, Exhibit SCE-2, entitled "The Settlement Agreement," is the settlement in resolution of the uncontrollable force claim. Exhibit SCE-2 does not contain any pages identified as Exhibit 1, Exhibit 2, or Exhibit 3. However, included in Exhibit SCE-2 are (1) a letter dated December 6, 2004, from Salton Sea to SCE, describing "post-claim actions" with respect to protective measures taken by Salton Sea, (2) a letter dated December 2, 2004, from SCE to CalEnergy essentially outlining the key terms of the uncontrollable force dispute settlement agreement, and (3) a document on letterhead of "QF Resources" entitled "Capacity Demonstration Procedures for Power Purchase Agreements Applicable to Southern California Edison Company QFID Nos. 3004, 3006, 3009,

[4] Although Rule 51.1(c) does not technically apply to applications for approval of settlement agreements, the substance of the requirement that parties justify the relief they seek applies to all applications and other requests by parties.

3025, 3026, 3028, 3039, 3050;" we presume that these are the documents to which SCE refers. Beyond attempting to identify these three documents and stating that they relate to proposed corrective measures by the QF and the resolution of other pending claims, SCE offers no further discussion of the three documents.

The December 2, 2004, letter discusses the terms of the settlement agreement that have already been disclosed; for the reasons previously discussed, we will not seal the document from the public record.

SCE makes no showing of ratepayer or competitive harm from the disclosure of "Capacity Demonstration Procedures for Power Purchase Agreements Applicable to Southern California Edison Company QFID Nos. 3004, 3006, 3009, 3025, 3026, 3028, 3039, 3050" or other protective measures agreed to by Salton Sea in its December 6, 2004, letter. We will not seal the documents from the public record.

Comments on Draft Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Kim Malcolm is the assigned ALJ in this proceeding.

Findings of Fact

1. The subject settlements resolve outstanding disputes and avoid the costs and risks of litigation. There is no evidence of collusion or other improper conduct by either party, and the settlements follow investigations by SCE on the nature of the Salton Sea 4 plant and negotiations with regard to alternative price indices for the Salton Sea 1 pricing formula.

2. The settlements' terms are well within the range of possible outcomes of litigation and impose costs on SCE ratepayers that are likely to be substantially less than the cost of litigation.

3. No party protested the application.

4. No hearing is necessary.

Conclusions of Law

1. The Settlement Agreement resolving the dispute over the failure of Salton Sea 4 between July and September 2003 is reasonable in light of the whole record, consistent with law, and in the public interest.

2. The Settlement Agreement referred to as the "Price Index Agreement" is reasonable in light of the whole record, consistent with the law, and in the public interest.

3. SCE should be allowed to recover the "Price Index Agreement" settlement payments in its rates.

4. In order that benefits of the settlement may be realized promptly, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The application of Southern California SCE Company (SCE) for approval of the Settlement Agreement resolving a dispute with Salton Sea Power Generation, L.P. (Salton Sea) with regard to the Salton Sea 4 plant failure and the Price Index Agreement is granted.

2. SCE shall be allowed to recover the "Price Index Agreement" settlement payments in its rates.

3. SCE's May 31, 2005 motion for reconsideration of the ALJ's ruling on confidentiality in this proceeding is denied.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.